services for TWE materially related to TWE's video programming activities;[118] and (7) has no role in the management or operation of TWE.[119] All of these limitations will apply to AT&T Comcast, post-closing, if the TWE interest has not already been divested.

With regard to the AT&T directors on the TWE Board, such directors are not involved in the video programming activities of AT&T Broadband or TWE.[120] A waiver is expressly provided for in these circumstances by the cable attribution rules.[121]

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[118] The Commission concluded in the *AT&T-MediaOne Merger Order* that AT&T's limited partnership interest in TWE was not insulated because AT&T's "sale of programming, via its attributable programming affiliates, to TWE is a service for TWE 'materially relating to its video-programming activities'" and that, as a result, AT&T post-merger "will be deemed materially involved in TWE's video-programming activities, precluding application of the insulated limited partnership exemption." *AT&T-MediaOne Merger Order* ¶ 49. In *Time Warner II*, however, the D.C. Circuit vacated the rule prohibiting the sale of programming by the limited partner to the partnership. *See Time Warner II*, 240 F.3d at 1143 ("We agree with petitioners that the no-sale criterion bears no rational relation to the goal, as the Commission has drawn no connection between the sale of programming and the ability of a limited partner to control programming choices.").

[119] AT&T Broadband's representatives on the TWE Board may vote only on certain extraordinary "investor protection" events, such as the merger of TWE, the sale of more than 10% of TWE's assets, incurrence of debt for money borrowed above a defined ratio, or voluntary bankruptcy. *See* TWE LPA § 12.1(c)(i)-(ii). Commission precedent makes clear that the fact that AT&T Broadband holds these investor protection rights does not preclude insulation of the interest. All of these rights are the types the Commission has in the past routinely permitted insulated limited partners, L.L.C. members, and other entities to vote on in order to protect their investment without triggering attribution. *See, e.g., Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 58 RR 2d. 604, ¶ 50 n.72 (1985) (identifying "a number of powers which a limited partner may exercise consistent with [the insulation] guidelines"); *Applications of Roy M. Speer, Transferor, and Silver Management Co., Transferee, for Transfer of Control of SKIL Broadcasting Partnership*, 11 FCC Rcd 14147, ¶ 25 (1996) (rights to participate in fundamental matters "are permissible investor protections that neither substantially restrict [the managing party's] discretion nor rise to the level of attributable influences"); *Applications of Quincy D. Jones, Transferor, and Qwest Broadcasting L.L.C., Transferee, for Transfer of Control of Quincy Jones Broadcasting Inc.*, 11 FCC Rcd 2481, ¶ 29 (1995) ("The right to participate in matters involving extraordinary corporate action . . . does not ordinarily undermine the nonattributable character of otherwise noncognizable interests.").

If insulation of the TWE interest became necessary because AT&T Broadband has not been able to sell the interest to a third party or parties prior to closing, AT&T Broadband will submit to the Commission in a timely manner the necessary certification and waiver request. Further, as noted above, before closing, Comcast and AT&T Broadband will take such additional steps, if any, as may be appropriate to ensure that AT&T Comcast would not be able to influence TWE prior to its ultimate sale. As a result, TWE cable systems subscribers should not be attributed to AT&T Comcast.

VI. THE MERGER WILL HAVE NO ANTICOMPETITIVE EFFECTS IN ANY RELEVANT MARKET.

The Commission's framework for analyzing the potential anticompetitive effects of a merger is well-established. The Commission first identifies the markets that "may be affected adversely by the merger."[122] The Commission next identifies the firms that

[120] AT&T Broadband has appointed two directors to the TWE Board, William Prip and David Barach. Their job title at AT&T is the same, Treasury Director-Capital Markets. Neither serves as an officer or director of AT&T Corp. or AT&T Broadband. Their responsibilities as Treasury Directors include: assessing and executing funding opportunities in the debt and equity capital markets; managing debt and equity balances through redemptions, repurchases, and retirements; managing financial risk through the use of interest rate and equity derivative instruments; evaluating financial impacts of capital markets related to mergers and divestments; and integrating corporate planning processes with AT&T's capital markets activities. Neither has any role in the video programming-related activities of AT&T Corp. or AT&T Broadband. Similarly, neither has any role in the video programming-related activities of TWE.

[121] *See* 47 C.F.R. § 76.503 (note 2(c)) ("In the case of common or appointed directors and officers, if common or appointed directors or officers have duties and responsibilities that are wholly unrelated to video-programming activities for both entities, the relevant entity may request the Commission to waive attribution of the director or officer").

[122] *AT&T-MediaOne Merger Order* ¶ 35. *Cf.* Department of Justice Reply Comments, CS Docket No. 98-82 (filed Feb. 19, 2002) (setting forth the Department's role in enforcing and analyzing the competitive implications of mergers and acquisitions in the MVPD industry).

participate in each relevant market.[123] The Commission then examines "market conditions and . . . the way in which the transaction is likely to alter the market."[124]

Comcast and AT&T Broadband provide services to consumers in different local markets and therefore the proposed merger will have no measurable impact on horizontal concentration in any relevant market.[125] Additionally, as demonstrated below, the combined entity will not have either the ability or incentive to exercise buyer market power in any relevant market.

A. Multichannel Video Programming Distribution

The merger will not have any adverse effect on competition in the business of multichannel video programming distribution. As the Commission has recognized, the

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[123] *Ameritech-SBC Merger Order* ¶¶ 71-72; *Bell Atlantic-NYNEX Merger Order* ¶ 58.

[124] *Bell Atlantic-NYNEX Merger Order* ¶ 96.

[125] The Applicants have determined that none of Comcast's cable franchises (including the franchises operated by Clearview Partners) overlaps with any of the franchises associated with AT&T Broadband's owned and operated or consolidated systems. In addition, AT&T Broadband has requested the most current franchise information from its non-consolidated systems, and, based on the information these systems have provided to date, there are no significant overlaps between the AT&T Broadband non-consolidated system franchises and Comcast's franchises. Although there are a small number of situations in which a Comcast cable system and an AT&T Broadband non-consolidated cable system both hold a franchise in the same area, it appears that none of these situations involves significant overbuilds between the two systems. Based on the information available to them, the Applicants have also identified 29 franchise areas where Comcast and TWE both have franchises that operate in the same area. Although Comcast and TWE have limited overbuilds in nine of these franchise areas, these overbuilds are modest and some are limited to a few dozen homes. Moreover, as discussed in section V.F, the Applicants intend to have no attributable interest in TWE at and after the closing of their merger. Finally, the Applicants have identified a small number of areas in which Comcast operates SMATV systems in territories served by cable systems in which AT&T Broadband currently has an attributable interest. As set forth in note 97, *supra*, the Applicants will take the necessary steps to ensure compliance with the Commission's cable-SMATV cross-ownership rule.

appropriate "geographic scope" for analyzing MVPD competition is "local."[126] AT&T Broadband and Comcast cable systems reach different residences and businesses and compete in different local markets. Therefore, their proposed merger will not reduce actual competition in any relevant local distribution market. Nor will the merger have any impact on potential competition in the relevant MVPD markets, because neither AT&T Broadband nor Comcast had any pre-merger plans to overbuild the other's cable systems.[127]

Further, the merged company faces intense competition from DBS providers. DirecTV and EchoStar, two DBS providers, distribute video programming throughout the United States and compete directly in all local markets served by AT&T Broadband, Comcast and other cable operators. In less than ten years, DBS has grown from serving no multichannel video subscribers to serving over 17 million subscribers, almost 19% of all MVPD subscribers.[128] Last year alone, DBS grew *twelve times faster* than cable, with both DirecTV and EchoStar experiencing tremendous subscriber growth.[129] Indeed, four out of five new customers now are choosing DBS over cable, and almost one-half of existing DBS subscribers are former cable customers.[130] In addition, AT&T Comcast will also face retail MVPD competition in many localities from MMDS providers

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[126] *Horizontal Ownership FNPRM* ¶ 19.

[127] *See AT&T-MediaOne Merger Order* ¶ 95.

[128] *See* AT&T Comments, CS Docket 98-82, at 18 (filed Jan. 4, 2002); Comcast Comments, CS Docket 98-82, at 21 (filed Jan. 4, 2002).

[129] *See 2001 Video Competition Report* ¶¶ 55-58.

[130] *See* J.D. Power & Associates, *2001 Syndicated Cable/Satellite TV Customer Satisfaction Study*, at 79 (Sept. 2001).

(including WorldCom and Nucentrix), SMATV providers (including Direct Cable, FreeAir Networks, and MCU Communications), MVPD services offered by electric utilities (including Starpower, Seren, and Sigecom), and cable "overbuilders" (including RCN, WideOpenWest and Knology).

B. Video Programming Production And Packaging

In addition, the merger will not adversely affect competition in the production and packaging of video programming for sale to MVPDs. As explained in detail below, AT&T Comcast will have neither "seller power" that would allow it to raise prices for, or discriminate in the distribution of, video programming, nor "buyer power" that would allow it to insist on anticompetitive terms and conditions for programming that it purchases from others.

When the Commission began tracking the number of national programming networks in 1992, there were 87 such networks. By 2001, that number had grown to 294, an increase of 238%.[131] Driven by strong consumer demand for video programming capacity due to digital upgrades, entry shows no signs of abating. The Commission's *2001 Video Competition Report* (Table D-4), for example, identifies 51 new programming services that are being planned for launch. Moreover, large, well-financed companies, such as Disney, News Corp., GE, Liberty Media, Viacom, and Vivendi, own many of these programming networks, including the "big four" broadcast TV companies (ABC, CBS, Fox, and NBC).[132]

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[131] *See 2001 Video Competition Report* ¶ 157.

[132] Kagan Media, *Cable Program Investor*, Sept. 11, 2001, at 4.

1. Market Definition

The relevant geographic market for the purchase and sale of video programming is quite broad and, for many types of programming, international in scope. There are no significant limitations on transporting programming and, as a result, video programming can be sent to virtually any distribution outlet in the world for roughly equivalent costs. Moreover, the only limiting factor on the international distribution of U.S.-produced content is whether there is foreign demand for that content. Foreign demand is quite strong; international sales now account for a very substantial portion of video programmers' businesses. [133]

Defining the product market contours, that is, identifying the relevant buyers and sellers, is complex because video programming producers have many distribution outlets and the importance of those outlets may vary from one type of programming to another. For example, broadcasters, as the Commission has recognized, compete with MVPDs in the purchase of much video programming.[134] There are many other important purchasers of video programming as well. Video programming producers deal with program "packagers" (*i.e.*, networks and syndicators) that act as middlemen and aggregate content for resale to cable, DBS, broadcast, and other retail distributors. Program producers also license their products to numerous other retail distributors directly, such as firms that own

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[133] *See* AT&T Comments, CS Docket 98-82, at 30 (filed Jan. 4, 2002); *see also* Declaration of Janusz A. Ordover ¶¶ 58-61, attached to AT&T Comments, CS Docket No. 98-82 (filed Jan. 4, 2002) ("Ordover Horizontal Ownership Declaration") (describing in detail the international scope of video programming purchasing).

[134] *See 2001 Video Competition Report* ¶ 13 ("Broadcast networks and stations are competitors to MVPDs in the advertising and program acquisition markets.").

movie theaters, retail stores, or Internet video-streaming sites.[135] All of these firms vie to serve the consumer demand for video programming, and many producers of video programming derive revenues from sales to many or all of these channels. These alternative channels are relevant to any foreclosure inquiry, *i.e.*, to determining whether a program producer could obtain sufficient revenues to recover the cost of the programming if the alleged forecloser refused to distribute the programming.

It is unnecessary in this case, however, to delineate the precise boundaries of the relevant product market. As explained below, it is clear that AT&T Comcast will account for only a very small percentage of video program sales and that the merger will not create or enhance seller market power. And, even if MVPD purchasers in the domestic market alone are considered, AT&T Comcast, which will purchase video programming for cable systems that serve less than 30% of MVPD subscribers, will have no buyer market power.[136]

2. Seller Market Power

The merger will not reduce competition or create market power in the sale of video programming by AT&T Comcast. Simply put, the combined company will have

[135] *See id.* ¶¶ 89-98.

[136] As set forth in section V.F above, the Applicants intend to have no attributable interest in TWE at and after the closing of their merger. Moreover, TWE subscribers should not be attributed to AT&T Comcast for purposes of measuring the buyer market power. Under the unique TWE partnership arrangement, AT&T has no ability to influence or control TWE's programming decisions. Competition analysis properly focuses on the economic realities of ownership. *See, e.g.*, *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 14 (1979) (federal competition laws "ha[ve] always been discriminatingly applied in the light of economic realities"); *Alvord-Polk, Inc. v. F. Schumacher & Co.,* 37 F.3d 996, 1007 (3d Cir. 1993) ("Antitrust policy requires the courts to seek the economic substance of an arrangement, not merely its form.").

only very modest programming interests and no enhanced ability to control the pricing of video programming to MVPDs.

AT&T Broadband owns attributable interests in three national video program services – E! Entertainment (10%), style. (10%), and iN DEMAND (44%) – and attributable interests in three regional networks – Fox Sports New England (50%), New England Cable News (50%), and Pittsburgh Cable News Channel (30%).[137] Comcast owns attributable interests in seven national video program services – E! Entertainment (40%), The Golf Channel (91%), iN DEMAND (11%), QVC (58%), style. (40%), The Outdoor Life Network (100%), and Discovery Health Channel (20%) – and four regional program services – Comcast SportsNet (78%), cn8, The Comcast Network (100%), Comcast Sports Southeast (72%), and Comcast SportsNet-MidAtlantic (100%).[138] Comcast's regional programming interests serve different geographic areas than do AT&T Broadband's regional programming interests. Comcast has announced that it will launch an additional new original programming network, the G4 Network, later this year.

Thus, AT&T Comcast will have ownership interests in a total of 24 video programming networks, or 6.4% of the 374 services.[139] This very limited set of post-

[137] As noted above, AT&T has significantly reduced its ownership of video programming services in the last year, by: 1) completing a spin-off of all of its interest in Liberty Media; 2) selling a portion of its interest in Cablevision (and, therefore, Rainbow Media), and removing its two Board members from the Cablevision Board of Directors, so that the interest is no longer attributable; and 3) selling its interests in several other programming services, including Food Network, The Outdoor Life Network, Speed Channel, and The Sunshine Network.

[138] Comcast also owns a *de minimis* interest (2%) in another regional programming service, Florida News Channel.

[139] Consistent with the Commission's *2001 Video Competition Report*, iN DEMAND is treated as 11 multiplex services. *See 2001 Video Competition Report* at Tables D-1, D-2. The 6.4% share figure is determined by dividing 24 national and regional services (*i.e.*,

merger interests (many of which are minority interests) presents no concentration problem or threat of competitive harm, particularly when viewed against the backdrop of the highly competitive video programming marketplace, and the far more significant program holdings of other media entities.[140]

3. Buyer Market Power

AT&T Broadband and Comcast are, of course, buyers of video programming. Based upon the Commission's analysis of prior cable mergers, there are two theories of competitive harm that could be raised by an assertion that the merger creates buyer "market power": first, that the merger would reduce horizontal competition in the purchasing of programming and thereby create buyer "monopsony" power; and second, that the merger would increase the incentive and ability of the merged firm to engage in vertical foreclosure in the purchasing of video programming from video programming producers. As explained below, the merger will not create any anticompetitive consequences under either of these theories.

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13 services plus 11 iN DEMAND services) by the 374 total national and regional services. *See id.* at Tables D1-D3. If regional and national services are considered separately, the combined shares are 5.8% for national (six national services plus 11 iN DEMAND services divided by the 294 total national services) and 8.8% for regional (seven regional services divided by 80 total regional services). *Id.*

[140] For the reasons noted above, this analysis does not include the video programming interests owned by TWE. TWE owns interests in HBO, Cinemax, Comedy Central, and CourtTV. Even if the ten TWE programming interests (seven HBO services plus Cinemax, Comedy Central, and CourtTV) were considered, the combination of the AT&T Broadband and Comcast interests would still be less than 10% of the total national services (17 Comcast and AT&T Broadband programming services plus 10 TWE programming services divided by 294 total national programming services). Such a small share could not possibly have an adverse impact on the competitive supply of programming. *See 2001 Video Competition Report* at Tables D-1, D-2 (divide 27 national services (the 17 services from above plus 10 TWE national services)) by the 294 total national services).

Traditional Monopsony Theory. Traditional monopsony theory holds that a firm buying a sufficiently high percentage of the output of a group of sellers may have the ability to set unilaterally the price it pays for goods or services produced by the sellers.[141] This theory has no applicability in the present case for several reasons.

First, AT&T Broadband and Comcast simply do not compete in the purchase of video programming so the transaction will not reduce competition in any way. The economic literature documenting the ability of companies to exercise this type of monopsony power was developed in the context of "rivalrous" goods – *i.e.*, a good that, when sold to one buyer, cannot be sold to another buyer.[142] As the Commission has recognized, however, video programming is not a rivalrous good: "[c]onsumption of the programming of a video programming network . . . by one viewer does not reduce the amount of the good available for another viewer."[143] This critical aspect of the "market structure" for video programming negates the normal intuition that a very large purchaser may be able to exercise monopsony power over sellers.

Where, as here, the "goods" in question are non-rivalrous, an MVPD "monopsonist" (that is a price setter) would choose the same bundle of programming as a competitive purchaser.[144] A cable MSO's appetite for quality programming is driven by consumer demand and *retail* competition that are independent of, and would be unchanged by, the acquisition of "monopsony" power over program packagers or

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[141] Robert Pindyck & Daniel Rubinfeld, *Microeconomics,* 352-54 (2001).

[142] *See* Ordover Horizontal Ownership Declaration ¶ 67.

[143] *Horizontal Ownership FNPRM* ¶ 15.

[144] *See* Ordover Horizontal Ownership Declaration ¶¶ 66-82 (explaining in detail why monopsony power is not a concern in this context).

producers. Thus, as a cable MSO gets bigger, there is no change in its incentives or practical ability – as determined by the marketplace – to buy the programming that is likely to produce the greatest number of viewers relative to the cost of the programming. For these reasons, even a cable "monopsonist" would purchase the same amount of programming as a non-monopsonist.

Second, the susceptibility of a producer or packager of video programming to "victimization" by a cable MSO turns, in large part, on the programmer's distribution alternatives.[145] There are unlikely to be any circumstances in which a buyer that accounts for 30% of total purchases could exercise buyer market power, and here, of course, the distribution channels and revenue sources available to video programmers extend well beyond the MVPDs, of which the combined firm will account for less than 30%.[146] The Commission has itself found that an MSO that purchases programming for systems that serve less than 30% of MVPD subscribers has no buyer market power.[147] Moreover, when the Commission addresses the *Time Warner II* remand of its cable cap, the analysis required by the court is almost certain to result in a subscriber limit *higher* than the *1999 Horizontal Ownership Order*'s 30% cap. Indeed, the dramatic changes in the video

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[145] *See, e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 794 n.64 (1968); *United States v. Syufy Enters.*, 903 F.2d 659, 666 (9th Cir. 1990).

[146] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 2.211 (1992), *available at*: <http://www.ftc.gov/bc/docs/horizmer.htm> (merger unlikely to facilitate unilateral exercise of market power if merged firm has less than 35% of relevant market); U.S. Department of Justice and Federal Trade Commission, Statements of Antitrust Enforcement Policy in the Health Care Area, Joint Purchasing Arrangements Among Health Care Providers (Sept. 15, 1993), *available at*: <http://www.ftc.gov/reports/hlth3s.htm#7> (joint purchasing arrangements among entities that purchase less than 35% of the total purchases of a product or service raise no competitive concerns and generally should not be subject to *any* antitrust scrutiny).

[147] *1999 Horizontal Ownership Order* ¶¶ 46, 50, 52.

industry that the *Time Warner II* court observed in the rulemaking record from 1999 are even more pronounced today: DBS has continued its explosive growth, cable channel capacity has further increased, and the extent of vertical integration between cable MSOs and video program networks has further declined.[148] *A fortiori*, a merger that results in an entity with less than 30% of the U.S. MVPD "market" today cannot be considered to raise any monopsony concerns.[149]

Distribution Foreclosure. Nor could the combination of AT&T Broadband and Comcast trigger any "distribution foreclosure" concerns. Such concerns could arise if the merged entity would have sufficient market power in the distribution of programming such that it would have the incentive and ability to foreclose access to its cable systems by refusing to buy programming that viewers desire from unaffiliated program packagers or producers. As demonstrated below, AT&T Comcast will have neither the incentive nor ability to foreclose other programmers.

As an initial matter, AT&T Comcast will not have the incentive to foreclose unaffiliated video program packagers or producers because AT&T Comcast will have only modest video programming interests and the damage caused by distribution foreclosure to its core MVPD business could be substantial. The business of AT&T

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148 *See 2001 Video Competition Report* ¶¶ 13, 32, 157, 186. Adjusting for AT&T's divestiture of Liberty (Liberty now is integrated with only a very small cable system in Puerto Rico that provides no basis for "leverage"), vertical integration declined again last year, just as in each of the prior several years. *Id.* at n.511 ("if we did not count Liberty Media as being vertically integrated, the ratio of vertically integrated channels would decrease from 35 percent in 2000 to 31 percent in 2001"); *see also* Comcast Reply Comments, CS Docket No. 98-82, at 24 & n.72 (filed Feb. 19, 2002).

149 This is particularly true given that the Commission also assumed a much more "concentrated" industry than exists today. *See 1999 Horizontal Ownership Order* ¶¶ 47, 53 (assuming only four cable MSOs in the U.S., with the two largest having 30% of the MVPD "market" and the two smallest having 20% of the "market").

Comcast will be, first and foremost, the MVPD business, that is, the distribution of video programming to consumers. If the company were to refuse to carry quality programming preferred by consumers, it would critically damage its core business and disadvantage itself in competition with other MVPDs, particularly DBS providers. It is clear that consumers view DBS and cable as substitutes and have demonstrated that they would readily switch from cable to DBS if they viewed AT&T Comcast's offering as inferior.[150] As a result, any action by AT&T Comcast that degraded the quality of its programming – by foreclosing competitively priced unaffiliated programming that customers want – would cause AT&T Comcast to lose customers to DBS or other MVPDs. Moreover, given the modest programming interests of AT&T Comcast, the potential benefits of such a strategy would be essentially non-existent.[151]

In addition to lacking the incentive to foreclose independent video programming, AT&T Comcast will have no ability to foreclose. In order to engage in foreclosure successfully, AT&T Comcast would have to control such a substantial percentage of *all*

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[150] *See supra* section VI.A.

[151] Moreover, Dr. Besen has illustrated how a larger MSO, such as AT&T Comcast, would have even less incentive to engage in such distribution foreclosure than would a smaller MSO. As compared to a small MSO, a large MSO stands to suffer greater customer losses (to DBS and other MVPDs) from basing programming decisions on factors other than customer preferences. Because cable companies incur high fixed costs regardless of the number of subscribers served, the loss of even relatively few subscribers has a significant impact on the profitability of the strategy. At the same time, the larger the MSO, the *lower* the gains will be from foreclosure. This is because the larger the foreclosing MSO, the fewer subscribers served by other MVPDs, and the lower the revenues to be gained by the MSO's programming affiliate from raising prices to other MVPDs. As Dr. Besen showed in his testimony in the cable horizontal ownership rules proceeding, an entity the size of the combined AT&T Comcast would have no incentive to undertake foreclosure (even if, contrary to fact, it had the ability) because the expected gains from this strategy would not offset the expected losses. *See* Declaration of Stanley M. Besen ¶¶ 41-57, attached to AT&T Comments, CS Docket No. 98-82 (filed Jan. 4, 2002).

distribution channels to which rival video programmers could turn as to be able to drive them out of business or substantially raise their costs. But, as explained above, even focusing solely on MVPD distribution channels, AT&T Comcast will purchase programming for systems that serve less than 30% of subscribers. As noted, the Commission has found that a 30% share of MVPD subscribers is insufficient to create buyer market power or raise foreclosure concerns.[152] Similarly, antitrust courts have consistently rejected claims that even absolute control of such a small share of purchases gives rise to competitive concerns.[153] Video programmers, of course, understand marketplace dynamics and would recognize that, even without AT&T Comcast they would effectively have access to more than the approximately 70% static share of other MVPDs. This opportunity is even more meaningful than a static analysis reflects, because any attempt by AT&T Comcast to base its programming decisions on anything other than customer demand could only increase the relative appeal of DBS and other competitors.[154]

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[152] *See supra* note 147.

[153] *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 46 (1984) (O'Connor J., concurring) (30% foreclosure insufficient); *Sewel Plastics v. Coca-Cola Co.*, 720 F. Supp. 1196, 1214 (W.D.N.C 1989) (40% foreclosure insufficient); *Gonzales v. Insignares*, No. C84-1261A, 1985 WL 2206, at *2 (N.D. Ga. 1985) (same). Additionally, this competitive analysis cannot be side-stepped on the assumption that AT&T Comcast can gain market power that it does not individually possess by acting collusively with other MSOs. The notion of "coordinated" action in this context defies basic economics. MVPDs that are unaffiliated with a particular video programmer have no incentive to foreclose rivals to that programmer. All that would accomplish is to make the unaffiliated MVPD's service less attractive. Moreover, these unaffiliated MVPDs would be among the "targets" of the foreclosure strategy – the principal reason to weaken the rival programmer is to be able to raise the prices the affiliated programmer charges to other MVPDs. There is thus no mutual benefit to be shared by colluding.

[154] *See Horizontal Ownership FNPRM* ¶ 22 ("[T]he competitive presence of DBS reduces cable operators' incentives to choose programming for reasons other than quality

Programmers also have effective counter-strategies that can be employed to prevent attempted distribution foreclosure. For example, most programmers are large multinational firms that own several different programming networks, including broadcast networks.[155] Even if AT&T Comcast were relatively indifferent as to whether it carried some of these networks, many of these programmers hold exclusive rights to very popular programming and are able to package their less popular programming with popular programming when negotiating carriage on cable systems. A threat by AT&T Comcast to drop one of these programmers' "second tier" networks could thus be met with a threat by the programmer to retaliate by denying AT&T Comcast carriage of its entire package of programming, including the programmer's most popular networks, or to increase significantly the price for the "marquee" programming that every cable operator must have. In fact, it is quite common for programmers to use "bundling" in this fashion to gain "bargaining power" as well as to lessen the competitive pressures on their "weaker" offerings that face substitutes. In particular, broadcast networks with other programming interests have bargaining power vis-à-vis cable operators in negotiating

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because a cable operator that selects programming on some other basis risks loss of subscribers if high quality programming is available via DBS."); *accord Time Warner II*, 240 F.3d at 1134 ("[A] company's ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the availability of competition"); *see also* National Cable and Telecommunications Association ("NCTA") Comments, CS Docket 98-82, at 14 (filed Jan. 4, 2002) ("What this means is that a cable operator that refuses to carry attractive programming services may now, in addition to failing to attract new subscribers and failing to maximize revenues from existing subscribers, lose existing subscribers to its competitors.").

[155] *See 2001 Video Competition Report* at App. D.

retransmission agreements and can, for example, require cable operators to buy less popular programming as a condition of obtaining popular broadcast network offerings.[156]

For all of these reasons, the proposed merger will not create any buyer market power in the purchase of video programming.

C. Set-Top Boxes, Cable Modems, And Other MVPD Consumer Equipment

Whether the relevant equipment market is defined broadly as encompassing all "navigation devices" as defined by the Commission in its commercial availability proceeding,[157] or more narrowly as individual types of devices such as modems and set-top boxes, the merger will have no adverse effect on any equipment market. As explained below, AT&T Comcast will account for a small fraction of the overall purchases of modems and set-top boxes and other navigation devices and thus will have no ability to exercise buyer market power over manufacturers of such devices.

[156] Moreover, AT&T Comcast will not have the ability to deny carriage on the cable systems that it owns and operates because programmers can obtain carriage on cable systems under leased access regulations or by striking carriage deals with broadcast TV networks who, in turn, have carriage rights under "must carry" and retransmission consent regulations. *See* 47 U.S.C. §§ 532, 534; 47 C.F.R. §§ 76. 970, 76.971 (leased access); 76.56, 76.57 (must carry); and 76.64 (retransmission consent). AT&T Comcast similarly will not have the market power to control the price of its programming, another requirement for a successful distribution foreclosure strategy. Without the market power over the price of programming, foreclosure would just cause losses (from subscribers lost by the refusal to carry valuable programming) without any corresponding gains. Where, as here, the "secondary market" (*i.e.*, video programming production and packaging) is deconcentrated and entry is possible, there is no real prospect of gaining such power over price. *See* AT&T Comments, CS Docket No. 98-82, at 52-53 (filed Jan. 4, 2002).

[157] *See Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80 (ongoing Commission rulemaking on navigation devices); 47 C.F.R. § 76.1200(c) (defining navigation devices as including "devices such as converter boxes, interactive communications equipment, and other equipment used by consumers within their premises to receive multichannel video programming and other services offered over multichannel video programming systems").

Moreover, because of intense competition, AT&T Comcast could have no conceivable incentive to do anything that would affect adversely the quantity or quality of available equipment that consumers need to enjoy its services.

The relevant geographic market for MVPD customer equipment is global. Set-top boxes, modems, and other navigation devices are purchased by MVPDs and MVPD customers in the U.S., as well as by MVPDs, consumers, and other buyers worldwide. For example, set-top boxes manufactured by Pace have been installed in 13 million homes throughout the U.S., Europe, Latin America, Australia, and the Far East,[158] while Scientific-Atlanta sells its products in the U.S., Europe, South America, and Asia.[159] Cable operators in the U.S. will purchase nearly one million digital set-top boxes from five foreign manufacturers this year, accounting for nearly 14% of cable set-top box deployments currently forecast for 2002.[160] Similarly, Com21, a U.S. company, generates 69% of its revenue from Europe and Asia.[161] Toshiba, headquartered in Japan,

[158] *See* Press Release, Pace, *Pace Ranked World's Third Largest Cable Set-Top Box Supplier* (Nov. 27, 2001), *available at:* <http://www.pacemicro.com/pressroom/newspopup.asp?section=release&id=180>.

[159] *See* Kagan, *Digital Set-Top Boxes: U.S. Shipments 2000-2005*, Feb. 21, 2001 ("*Kagan Report*") (also noting that Motorola has been marketing its boxes aggressively in South America). The same is true for satellite set-top boxes, where Korean manufacturers expect to capture 30% of the global market by 2005. *See Set-Top Box Exports Grow to $1.5 Bil. by 2005*, Korea Times, Dec. 15, 2001. CableLabs has certified approximately 60 modem manufacturers as part of its DOCSIS program, a six fold increase over the last two years, and nearly 200 models of cable modems received CableLabs' DOCSIS certification. *See* CableLabs Certified Cable Modem Products, *available at:* <http://www.cablelabs.com/certification.html> (last visited Jan. 24, 2002).

[160] *See* Business Wire, *Pioneer and Sony Digital Cable Set-Top Box Deployments Changing Market Landscape* (Sept. 27, 2001), *available at:* <http://investor2.cnet.com/newsitem-bloomberg.asp?symbol=6MU3BTCQBQ&Ticker=SNE>.

[161] *See* Melissa Phillips, Cahners In-Stat Group, *Cable Modem Market Analysis* 28 (Oct. 2001).

and Samsung, based in Korea, are leading suppliers of modems to the U.S. Motorola, the industry leader, sells its modems throughout the world.[162]

With approximately 91 million subscribers, the entire U.S. cable industry represents less than a quarter of the 317 million worldwide cable and DBS subscribers, and AT&T Comcast will serve less than 30% of U.S. MVPD purchasers.[163] Thus, the relevant AT&T Comcast "share" of set-top box and cable modem purchases does not even rise to double digits. AT&T Comcast, accordingly, cannot be considered to have the power to do anything to harm the production or supply of such equipment.[164]

Even assuming *arguendo* that the relevant geographic market were limited to the United States, AT&T Comcast would not have market power and would have no ability to harm set-top box and cable modem manufacturers. The combined entity's less than 30% share of U.S. MVPD subscribers will be far too low to support any claim of buyer market power for many of the same reasons discussed above with respect to video

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162 *See id.* at 27-31 (also noting that Ericsson, a Swedish company, sells cable modems in the Americas, Europe, and Asia, and that Terayon, a U.S. company, exports to the Asia-Pacific region); *see also* Press Release, Toshiba, *Berry to Lead Cable Modem Manufacturer's Product Line Expansion* (July 24, 2001), *available at*: <http://www.toshiba.com/taisnpd/news/releases/010724.html> (noting that, in the first quarter of 2001, cable modem sales from Toshiba accounted for more than 26% of all cable modems sold in North America).

163 It is appropriate to consider the entire global MVPD equipment base, as opposed to simply the cable base, because equipment manufacturers who supply set-top boxes or modems to cable MSOs also manufacture and supply similar equipment (that largely reflects the same research and development efforts and costs) to cable MSOs' video and Internet competitors. For instance, Motorola, Pace, and Sony each manufacture set-top boxes for cable and DBS providers. *See* Cahners In-Stat, *Set-Top Box Internet Access* (Sept. 2001).

164 *See NCTA Industry Overview 2001* at 16 (Dec. 2001), *available at:* <http://www.ncta.com/pdf_files/2001IndOvrvw.pdf>; Michelle Abraham & Mike Paxton, Cahners In-Stat Group, *Worldwide Digital Satellite and Cable TV Services* 59, 67 (Dec. 2000).

programming. Indeed, in the AT&T-MediaOne merger, the Commission concluded that an entity with 42% of U.S. MVPD subscribers attributed to it had no ability to exercise buyer power over set-top box or modem manufacturers.[165]

Just as importantly, cable equipment can be purchased directly by consumers. The ability to sell cable equipment directly to consumers allows equipment manufacturers simply to bypass any cable company, no matter how large, that refused to pay competitive market prices.[166] There is a steadily growing retail market for cable equipment. For example, Motorola's cable modems can be purchased in over 1,000 retail stores throughout the United States, including Best Buy, Circuit City, CompUSA, and The Wiz, or directly through Motorola's Web site.[167] Similarly, both RCA and Toshiba sell their cable modems through Best Buy and CompUSA and directly to consumers through their own Web sites.[168] Indeed, cable operators support such retail distribution

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[165] *See AT&T-MediaOne Merger Order* ¶ 42.

[166] *See id.* ¶¶ 97, 100 (navigation device rules "alleviate concerns regarding competition in the production and sale of set-top boxes and modems," and "by requiring MVPDs to grant all equipment manufacturers an opportunity to sell equipment to the MVPDs' subscribers, the navigation device rules limit MVPDs' ability to exercise excessive market power and dominate the equipment market").

[167] *See* Motorola Comments, CS Docket No. 01-129, at 2 (filed Aug. 3, 2001).

[168] *See* Press Release, Toshiba, *Berry to Lead Cable Modem Manufacturer's Product Line Expansion* (July 24, 2001), *available at:* <http://www.toshiba.com/taisnpd/news/releases/010724.html>; *Modems from BestBuy.com*, *available at:* <http://www.bestbuy.com/ComputersPeripherals/ModemsNetworking/Modems.asp?m=488&cat=540&scat=54> (last visited Feb. 22, 2002); *CompUSA Cable Modems*, *available at:* <http://www.compusa.com/products/products.asp> (last visited Feb. 22, 2002); RCA Digital Cable Modems, *available at:* <http://ww.rca.com/product/viewproductcategory/0,,CI305,00.html> (last visited Feb. 21, 2002).

channels because they are instrumental in attracting new customers.[169]

In addition, the OpenCable Application Platform ("OCAP") middleware specification, recently released by CableLabs, will encourage the development of additional retail distribution and competition by establishing an interactive broadband service platform based on open industry standards.[170] The six largest cable operators – including both AT&T Broadband and Comcast – have committed to support OCAP in their cable networks,[171] and leading consumer electronics equipment providers have also

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[169] *See, e.g.*, Linda Haugsted, *Operators Shop for Retail Shelf Space: Partnerships with Electronics Chains Push Broadband Sales*, Multichannel News, July 23, 2001, at 8A (noting that 12.5% of Cox's modem sales in the first quarter of 2001 were made in retail sales, up from 2% a year earlier); *id.* (noting that Cablevision is selling 5,000 modems a week out of 26 Wiz stores); AT&T Comments, CC Docket No. 98-146, at 10 (filed Sept. 24, 2001) (noting importance of retail in marketing cable modem service); Press Release, Comcast Cable, *Comcast Expands Retail Presence with Best Buy* (Oct. 18, 2001), *available at:* <http://www.comcast.com/press_room/viewrelease.asp?pressid=98> (offering Comcast's high-speed internet and digital cable TV services at Best Buy, thus making it easy for customers to obtain new services). These services are also sold at CompUSA, Circuit City, and Staples, as well as on-line through Comcast's home page. *See* Internet Products: Where Can I Get It?, *available at:* <http://www.comcastonline.com/wherecanigetit.asp?> (last visited Feb. 22, 2002). Furthermore, in a unique effort to attract new customers, Comcast has set up High-Speed Internet Mall Kiosks that offer products, information, and sampling of the service. *See* Internet Products: Comcast High Speed Internet Mall Kiosks, *available at:* <http://www.comcastonline.com/kiosks.asp> (last visited Feb. 22, 2002).

[170] Press Release, CableLabs, *CableLabs Publishes OCAP Middleware Specifications* (Jan. 3, 2002), *available at:* <http://www.cablelabs.com/news_room/PR/02_pr_OCAP_010302.html>. The OCAP standard is largely based on the European Multimedia Home Platform ("MHP") middleware specification, thus creating an opportunity for worldwide interoperability of interactive applications and content. *See id.* (also quoting Canal+ Technologies CEO as saying that "[l]everaging MHP as the foundation for OCAP sends a strong message that the US cable market is definitively a member of the global digital television community").

[171] *See Ex Parte* Letter from Neal Goldberg, NCTA, to Chairman Powell, FCC, filed in PP Docket No. 00-67 (Jan. 3, 2002).

endorsed the effort.[172] Similarly, in October 2001, the NCTA launched an industry-wide initiative to encourage manufacturers of digital set-top boxes to make available to retail outlets the same set-top boxes with embedded security that are made available to the local cable operator.[173] Under the initiative, cable operators will authorize and support these "integrated" retail boxes in their systems.

Finally, given the ubiquitous availability of DBS and DSL alternatives, AT&T Comcast will have no *incentive* to exercise market power against set-top box or modem manufacturers. Any action by a cable operator that has the effect of restricting the supply of high-quality equipment that enables consumers to access operator-provided services would cause the operator to lose cable customers to the DBS competitors and Internet customers to DSL or other competing providers. Thus, AT&T Comcast will be compelled by market forces to deal fairly with equipment manufacturers and to ensure that it and its customers have access to the best quality state-of-the-art equipment at the best possible price.[174]

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[172] *See, e.g.*, *id.* at p. 2 of attached press release (quoting Paul Liao, CTO of Matsushita, as saying that "the OCAP specification is a good step toward a consistent, open, and more global platform, which should permit the development of an expanding world of advanced interactive cable services").

[173] *See Ex Parte* Letter from Robert Sachs, NCTA, to Chairman Powell, FCC, filed in CS Docket No. 97-80, at 2 (Oct. 10, 2001).

[174] As a result of AT&T's spin-off of Liberty Media (and thus Liberty's ownership interest in Motorola), neither AT&T nor Comcast has an attributable ownership interest in Motorola or any other set-top box or modem manufacturer. Accordingly, the combined entity will have no incentive or ability to act anticompetitively with regard to any equipment manufacturer.

D. Interactive TV Services

The merger will not harm consumers or competition with respect to the provision of interactive TV services. As with MVPD and other services discussed above, Comcast and AT&T Broadband do not compete with each other in the provision of interactive TV services, so the merger will have no adverse effect on competition in this business. Moreover, as explained below, the merger will not enhance the ability or the incentive of AT&T Comcast to engage in anticompetitive conduct in providing these services to its customers.

Comcast currently offers video-on-demand over a number of its digital cable systems, and both Comcast and AT&T Broadband offer their digital cable customers interactive programming guides. As described in section II.B, the two companies also are exploring other offerings that could be characterized as interactive TV services. There are innumerable risks and uncertainties concerning the future success of interactive TV including, among others, what services consumers want, how those services can best be provided under current market conditions, and which business models will allow service providers to recoup the significant investments required to provide those services. Indeed, as both Comcast and AT&T Broadband have previously demonstrated, given the nascent and highly dynamic nature of interactive video services, it is entirely premature to even attempt to define, much less regulate, "interactive TV services."[175]

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[175] *See generally* Comcast Comments, CS Docket No. 01-7 (filed Mar. 19, 2001) ("Comcast Interactive TV NOI Comments"); AT&T Comments, CS Docket No. 01-7 (filed Mar. 19, 2001) ("AT&T Interactive TV NOI Comments"); *see also AOL-Time Warner Merger Order* ¶ 218 ("Given the infancy of [the interactive TV service] market and the limited record before us, it would be imprudent to endorse a comprehensive definition of ITV services."); David Ward, *Experts Say Interactive TV Profits Still Are Years Away*, Communications Daily, Mar. 1, 2001, 2001 WL 5052673 (quoting Jack

Even at this nascent stage, there is substantial evidence of emerging competition and innovation in the provision of interactive TV services.[176] Numerous companies are investing substantial resources in developing, deploying, and distributing interactive TV content, equipment, and services. These companies range from traditional video distributors and programmers, to providers of operating systems, middleware, and other software products, to consumer electronic manufacturers who are creating integrated/web-enabled TVs and game consoles.[177]

In this highly competitive, fast-evolving, and risk-laden environment, AT&T Comcast will have no market power in the provision of interactive TV services. The combined entity will have less than a 30% share of U.S. MVPD subscribers, which, for the same reasons discussed above with respect to video programming, is far too low to create market power concerns. There is a wide range of distribution platforms for interactive TV services, including cable, DBS, and terrestrial broadcast television. DBS providers have been particularly aggressive in pursuing the development and deployment of interactive TV services. It is estimated that, by the end of 2003, satellite television providers will have 9.3 million interactive customers, compared to 7.8 million for the

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Tauper, Executive Vice President, Game Show Network, as saying, "Right now [interactive TV] is not a business, it's an expense.").

[176] Both Applicants have filed comments in response to the Commission's Notice of Inquiry regarding interactive TV that describe in detail the dynamic and highly competitive nature of interactive TV services. *See* AT&T Interactive TV NOI Comments at 8-28; Comcast Reply Comments, CS Docket No. 01-7, at 2-8 (filed May 11, 2001) ("Comcast Interactive TV NOI Reply Comments").

[177] *See* AT&T Interactive TV NOI Comments at 9 (setting forth list of companies involved in interactive TV services); *see also AOL-Time Warner Merger Order* ¶ 231 ("At this early and fluid stage of the ITV market, there are a growing number of firms that now provide or plan to provide ITV service.").

cable industry.[178] Telephone companies can also provide a platform for interactive TV services through DSL technology.[179] In addition, broadcasters are pursuing opportunities to use their digital spectrum to provide datacasting and multicasting interactive TV services. There are a variety of other interactive TV distribution methods as well.[180]

Separate and aside from the merger agreement with AT&T, Microsoft and Comcast Cable have agreed to a binding term sheet which provides that the parties will conduct a trial during 2002 of an interactive TV platform, including set-top box middleware.[181] If the trial results meet agreed technical specifications, the platform

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[178] *See* The Meyers Group, *Interactive Television Outlook 2000*, at 51 (June 2000) (citing findings made by the Carmel Group); *see also Cable Burned by Bird*, CEDaily, Jan. 22, 2001 ("According to a report from Cahners In-State Group, digital direct-to-home satellite services are pulling way ahead of digital cable TV providers in the race to get interactive digital television services to market."); Goldman Sachs, Global Equity Research, *Satellite Communications: DBS Operators,* Dec. 18, 2000, at 28 ("We believe DBS operators will beat cable to the punch as they aggressively roll out interactive and personal video recording (PVR) services over the next 3-6 months and beyond.").

[179] *See* ITV REPORT.COM, *Kingston Communications Signs Up for Pace's Digital Set-Tops* (Sept. 6, 2000), *available at:* <http://www.kcom.com/news38.html> (quoting Paul Ashmore, Sales Director, Pace Micro, as saying, "DSL technology is a highly effective way for telecommunications companies to rapidly expand the capability of their established networks, enabling them to provide high quality interactive television services challenging traditional network operators in the delivery of home entertainment services.").

[180] *See* AT&T Interactive TV NOI Comments at 22-23.

[181] Set-top box middleware acts as an interface between set-top box hardware and interactive TV software applications. The purpose of middleware is to reduce or eliminate the need to customize applications software for each set-top box model. Middleware permits application software developers to write one version of a program which will work on a number of different set-top boxes. Effective middleware should reduce the costs of software development and encourage the development of more and varied interactive TV applications. As noted above, CableLabs is currently developing OCAP, which is intended to enable the developers of interactive TV services and applications to design such products so that they will run successfully on any cable television system in North America, independent of set-top or television receiver hardware or operating system software choices.

meets defined competitive requirements, and if a launch would meet Comcast Cable's reasonable business objectives, Comcast Cable has agreed that it will commercially launch the Microsoft platform to at least 25% of its newly installed middleware customer base.

The testing arrangement with Microsoft is plainly pro-competitive because it will facilitate the development and testing of a new middleware product. At present, Comcast Cable has not deployed any set-top box middleware in its systems. Comcast Cable is evaluating various potential middleware products for both current and future generations of set-top boxes. To the extent that the testing is successful, the testing arrangement will result in a new and better product that would reduce the costs and increase the variety of applications software for set-top boxes – clearly a pro-competitive result that benefits consumers.

The testing arrangement is also quite flexible in scope and will not result in anticompetitive consequences. Comcast Cable is under no obligation to deploy the Microsoft interactive TV platform or middleware unless a number of conditions are met, including (i) the trial results meet agreed technical specifications; (ii) the platform meets certain defined competitive requirements, including being compliant with industry standards for future generation set-top boxes, including the OCAP standard; and (iii) either (a) deployment would meet Comcast Cable's reasonable business objectives or (b) Comcast Cable deploys an alternative middleware solution for the current generation of set-top boxes. Failure of any of these conditions excuses any roll-out obligation on the part of Comcast Cable.